veyance is lost;[11] a result at least doubtful on principle, since *primâ facie* it amounts to a denial of the most adequate remedy for an admitted wrong on the ground that the wronged person has taken the only possible course to make it available. It may be argued that marriage after knowledge affords ground for presuming consent to the conveyance; but if merely a rebuttable presumption of fact it could hardly support the result of the cases cited, and if a conclusive presumption of law, it is submitted, it is likely to do violence to the truth as many times as otherwise. Conceivably, the desirability of interfering as little as possible in a relation so peculiarly personal as that of marriage might be ground for a rule of policy against affording post-nuptial relief for ante-nuptial wrongs which were discovered before the relation had commenced.

If, in violation of his duty to disclose, the conveyance is kept secret until after the marriage, the wife has been placed, by what amounts to active misrepresentation, in a situation where this right to terminate the relation is no longer available, and so specific restitution is the only adequate remedy. If the above definition of the fiancé's duty be accepted, those decisions which hold that a secret gift of land to one to whom there is some moral obligation, as a dependent child, or an aged mother, is not a fraud upon the intended wife,[12] would seem difficult to reconcile. Certainly the prospective dower interest is no less impaired, nor does the moral obligation to the grantee seem sufficient to justify concealment from the wife.[13] But since the conflicting claims of both wife and donee are essentially equitable, the wrong of the grantor in concealing the gift from his fiancée does not seem sufficient reason for disturbing the legal title.[14]

ECONOMIC PRINCIPLES OF THE LAW OF WATERS. — A system of water-rights may be adapted to the economic conditions of one country and yet be entirely unsuited to the needs of another. All systems start by treating water, like air and light, as *publici juris*. In England, however, the greatest possible use of water in watercourses was not essential to prosperity, and all but riparian owners were strictly excluded from its use.[1] Riparian owners could use it for domestic and for certain secondary purposes such as irrigation.[2] But the flow of water could not be sub-

[11] See cases cited in note 7, *supra*. *Contra*, Poston *v.* Gillespie, *supra*.

[12] Hamilton *v.* Smith, 57 Ia. 15, 10 N. W. 276; Fennessey *v.* Fennessey, 84 Ky. 519, 2 S. W. 158; Dudley *v.* Dudley, 76 Wis. 567, 45 N. W. 602; Champlin *v.* Champlin, 16 R. I. 314, 15 Atl. 85. And see for a similar doctrine in England, cases explainable on other grounds. Hunt *v.* Matthews, 1 Vern. [3d ed.] 408; King *v.* Cotton, 2 P. Wms. 674.

[13] See England *v.* Downs, 2 Beav. 522, 529; Taylor *v.* Pugh, 1 Hare 608, 614–615; Williams *v.* Carle, 10 N. J. Eq. 543, 550–551.

[14] It is conceivable that the courts, although unwilling to set aside the voluntary conveyance, might make the wife whole by giving her a correspondingly larger claim in any land retained. However, to convert such an equity into a legal right would necessitate objectionable litigation against the husband; while if allowed to remain as a mere equity it would be valueless against a purchaser without notice, while by its indefiniteness effectually preventing all alienation to one having notice.

[1] Embrey *v.* Owen, 6 Ex. 353; Mason *v.* Hill, 5 B. & Ad. 1.

[2] Embrey *v.* Owen, *supra*; Weston *v.* Alden, 8 Mass. 135; Blanchard *v.* Baker,

stantially diminished since the fundamental right was to have the water flow on as it had been accustomed.[3] Even to-day in England a non-riparian use can be enjoined regardless of whether or not the complainant is damaged.[4] Thus, by the common law, due to the over-emphasized protection of the man below, the fertilizing waters are finally poured into the sea, wasting a large possible benefit which even the limited class of riparian owners are prevented from utilizing. Such an uneconomic result is shocking from the standpoint of a community where water is precious.[5]

The Doctrine of Appropriation, adopted by several jurisdictions, avoids many of these uneconomic results.[6] It gives to the first lawful taker a right which cannot be infringed or objected to by later users, either above or below. The right is limited to the amount strictly necessary for the beneficial purpose desired. So long as this right is not interfered with, others can utilize the water.[7] Furthermore, the rights are transferable.[8] This doctrine, although admirable as insuring against waste, still endows a limited class. But this can be objected to only from a socialistic view somewhat inconsistent with property rights in general.

In jurisdictions committed to the strict doctrine of riparian rights there may still be an opportunity to make a more judicious distribution of flood water. Such water constitutes a windfall. It comes at a time of plenty and using it in new ways will deprive no one. It should not be wasted by treating it as surface water,[9] or as part of the watercourse. Instead, it should be subject to the use of any one having lawful access to it.[10] Regulation of rights in it according to the principles of appropriation would bring about the most good. The difficulty arises, however, whether flood water can be treated differently.[11] Many authorities

8 Greenleaf (Me.) 253. See GOULD ON WATERS, p. 385; WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 411. See *contra*, FARNHAM, WATERS, p. 1895.

[3] Roberts *v.* Gwyrfai District Council, [1899] 1 Ch. 583.

[4] McCartney *v.* Londonderry & Loughswilly Ry. [1904] App. Cases 301; Stockport Waterworks Company *v.* Potter, 3 H. & C. 300. In America some cases required that damage be shown: Elliot *v.* Fitchburg R. Co., 10 Cush. 191; Modoc Land & Live Stock Co. *v.* Booth, 102 Cal. 151, 36 Pac. 431 (overruled); Kensit *v.* Great Eastern Ry., 27 Ch. D. 122 (overruled); WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 495, note 22. But others hold that the non-riparian use is damage *per se*. Anaheim Water Co. *v.* Fuller, 150 Cal. 327, 88 Pac. 978. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 499.

[5] See Clough *v.* Wing, 2 Arizona, 371, 379, 17 Pac. 453, 455.

[6] Willey *v.* Decker, 11 Wyo. 496, 73 Pac. 210; Stowell *v.* Johnson, 7 Utah 215, 26 Pac. 290.

[7] See Hunt *v.* Story, 64 Fed. 510, 514.

[8] Mt. Carmel Fruit Co. *v.* Webster, 140 Cal. 183, 73 Pac. 826. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 332.

[9] Broadbent *v.* Ramsbotham, 11 Ex. 602; Baulsby *v.* Speer, 31 N. J. L. 351.

[10] Fifield *v.* Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054; Gallatini *v.* Corning Irrigation Co., 163 Cal. 405, 126 Pac. 864. See Crawford *v.* Hathaway, 67 Neb. 325, 373, 93 N. W. 781, 797; WIEL, WATER RIGHTS IN THE WESTERN STATES, 2 ed., p. 503; 26 HARV. L. REV. 278. The California cases have limited storm waters to "unusual floods," thus badly impairing the doctrine.

[11] Flood water not an integral part of the regular stream certainly lends itself to different treatment. It is an intermittent, not a regular, flow like a watercourse. Yet its appearance is regularly recurrent, not casual, as is surface water. And even if an integral part of the stream, it is an excess over the normal flow, just as much as

have dealt with flood waters according to the rules applicable to natural streams, and others have treated them as surface water. But even in those jurisdictions, in view of the great confusion in past decisions and the inevitable presence of distinguishing facts, the doctrine of *stare decisis* should prove no obstacle to a new classification.[12] The resulting conservation of natural resources should justify courts in confining the other classes to the waters which are clearly within them. Strangely enough one of the states where irrigation is of least importance has felt most strongly the desirability of treating flood water differently from surface water or water in a watercourse, — as evidenced by a decision that a non-riparian owner has not only a right to flood water, but also a right to have it sweep across a riparian owner's land. *Thompson* v. *New Haven Water Works*, 86 Atl. 585. Praiseworthy as is the feeling that inspired such a decision, the actual holding is objectionable. It subjects the riparian owner's land to a highly onerous easement that is utterly inconsistent with the common law of real property. Furthermore, the right given the plaintiff is to have the fertilizing water flow across his land. If the court is consistent and gives this right to all within the reach of the floods, none of the water can be taken out. The inevitable result is that the windfall will be wasted in the sea. The case, therefore, falls short of a satisfactory solution of the problem.

COMPETITION AS A JUSTIFICATION OF THE SECONDARY BOYCOTT. — A. refuses to do business with B. unless B. stops dealing with C. B. complies with A.'s demand. May C. sue A.? A.'s act is admittedly tortious unless justifiable under certain limited rights.[1] One of these is his right to compete with others for trade or employment.[2] But under what circumstances does this right justify him here?

Where A. is an individual we have no authority on this question. Nevertheless, a partial answer may be ventured. The right to inflict intentional harm on another can be recognized, only because of some preponderating public benefit anticipated from its exercise, — hence its extent must be determined by what is necessary to secure this benefit. Now the objects of the right to compete are to compel every citizen to give the community his best service, to have work done by the most competent, and to secure equality of opportunity to all. None of these objects can well be attained unless the citizen is free to concentrate his efforts along lines chosen by himself, — whence it results that the right to compete includes the right to refuse to take part in any enterprise

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if it were in a different watercourse. A difficult question of fact is raised, and this has constrained many authorities to treat flood water in the watercourse in the same way as the regular stream. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., p. 377.

[12] Authorities are collected in 25 L. R. A. 531; WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., p. 375.

[1] Walker *v.* Cronin, 107 Mass. 555; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111. *Cf.* Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946. See POLLOCK, TORTS, 9 ed., p. 21.

[2] See the language of Bowen, L. J., in Mogul S. S. Co. *v.* McGregor, L. R. 23 Q. B. D. 598, 613.